



INTERIOR BOARD OF INDIAN APPEALS

Ruth Morgan Linabery v. Acting Great Plains
Regional Director, Bureau of Indian Affairs

53 IBIA 42 (02/14/2011)

Related Board case:
51 IBIA 57



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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RUTH MORGAN LINABERY,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 09-9-A
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	February 14, 2011

In this appeal to the Board of Indian Appeals (Board), Ruth Morgan Linabery (Appellant) challenges the grazing rental rate set by the Bureau of Indian Affairs (BIA) for the 2009 grazing season for individually-owned Indian lands on the Rosebud Reservation (Reservation). Appellant holds grazing permits for range units on the Reservation. The grazing rate decision was made by the Acting Great Plains Regional Director (Regional Director) of BIA on August 28, 2008; the decision raised the grazing rental rate for the 2009 grazing season from \$14.61/Animal Unit Month (AUM)¹ to \$18.40/AUM, pursuant to 25 C.F.R. § 166.408.

Appellant contends that the \$18.40/AUM grazing rental rate is too high and that the Regional Director should not have increased the rate because (1) the Reservation has been affected by “an extended period of drought of at least 8 years;” (2) prices for agricultural necessities, such as fuel, trucking, sale expenses, labor, fencing materials, water pumps, water tanks, and other water necessities have “skyrocketed;” and (3) the Regional Director did not receive “input from local people” before making her decision regarding the grazing rental rate. Notice of Appeal at 1-2.

Appellant did not file an opening brief and her notice of appeal does no more than summarize the above objections to the grazing rental rate increase. She has not met her burden of proof to establish that the Regional Director’s decision is unreasonable and not supported by law and substantial evidence. We therefore affirm the Regional Director’s

¹ An AUM is “the amount of forage required to sustain one cow or one cow with one calf for one month.” 25 C.F.R. § 166.4.

decision to adjust the grazing rental rate to \$18.40/AUM for the 2009 grazing season for individually-owned Indian lands on the Reservation.

Background

In previous cases, the Board has described the regulatory framework for grazing permits and grazing rental rates for Indian trust or restricted lands. *See Hall v. Great Plains Regional Director*, 43 IBIA 39, 39-41 (2006); *Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308, 308-09 (2005). With limited exceptions, anyone wishing to graze livestock on Indian trust or restricted land must first obtain a permit to do so. *See* 25 C.F.R. § 166.200.

BIA may consolidate various tracts of Indian rangeland into range units in order to manage grazing under a permit; a range unit may include a combination of tribal, individually-owned, and/or government land. *See id.* §§ 166.4 (definition of “range unit”) and 166.302 (How is a range unit created?); *see also DuBray v. Great Plains Regional Director*, 48 IBIA 1, 4-5 (2008). BIA sets the grazing rate for the individually-owned Indian lands included in a range unit, but the tribe sets the grazing rate for the tribal land in the unit. 25 C.F.R. § 166.407.

BIA establishes the grazing rental rate for individually-owned Indian lands based on the fair annual rental value. *See id.* §§ 166.400(b)(1), 166.401, 166.408. “Fair annual rental” means “the amount of rental income that a permitted parcel of Indian land would most probably command in an open and competitive market.” *See id.* § 166.4. Grazing permits for a new permit period are offered to prospective permittees at the current fair annual rental value established by BIA. After BIA issues grazing permits for individually-owned Indian lands, BIA reviews the grazing rental rate annually, and may adjust the grazing rental rate to ensure that the Indian landowners are receiving the fair annual return. *See id.* § 166.408. An adjustment must be based upon an appropriate valuation method that takes into account the value of improvements made under the permit, unless the permit provides otherwise, and that follows the Uniform Standards of Professional Appraisal Practice (USPAP). *See id.*

Appellant, a member of the Rosebud Sioux Tribe (Tribe), holds grazing permits for Range Units 30 and 101. Administrative Record (AR) Tabs 13, 14. BIA issued the permits for a 10-year period beginning December 1, 2006. *Id.* The initial rate for individually-owned Indian lands was \$14.61/AUM, which remained unchanged through

the 2008 grazing season. *See Rosebud Indian Land and Grazing Ass'n and its Members v. Acting Great Plains Regional Director*, 50 IBIA 46, 46-47 (2009).²

In order to conduct the annual rental rate review for the 2009 grazing season, the Regional Director contacted the Office of the Special Trustee (OST) to request a reservation-specific market study to provide information to BIA for determining the fair annual rental rate. *See* AR Tab 12, Memorandum from Regional Director to OST, Jan. 29, 2008. The Regional Director identified several reservation-based conditions that might affect the grazing rate, including BIA's prepayment requirement for the entire annual grazing rental, the payment of a 3% annual preparation fee, and the assessment of tribal use taxes on some reservations. *Id.* at 1. The Regional Director also listed other services and considerations that the Regional Director asked the appraiser to study. *Id.* (requesting that the value of fencing development and maintenance, cattle round-up and livestock counting, weed control, water development and maintenance, tenure and duration of leases, public hunting access, imposition of first liens on livestock for unpaid rent, and other factors distinguishing BIA grazing units from private pasture rentals be studied).

Jerry Hulm, a private appraiser, conducted the 2009 Grazing Rate Study for OST. AR Tab 10, 2009 Grazing Rate Study. The appraiser prepared an analysis and study of grazing rates in the area surrounding the Rosebud Reservation, utilizing information drawn from 63 private leases. *See id.*, 2009 Grazing Rate Study at 5 and Letter from Hulm to Oliver, May 15, 2008.³ The appraiser also obtained information from county agents and agricultural lenders in the area. *Id.* at 5. The appraiser considered grazing rental rates from

² The AUM rate is one component that BIA uses for determining the rental price for a given range unit, or of a tract of land within the range unit. In order to determine the rental price, the AUM rate is multiplied by the grazing capacity of the relevant unit of land, as expressed in a total number of AUMs. *See* 25 C.F.R. § 166.4 (definitions of "grazing capacity," "grazing rental payment," and "grazing rental rate"). The Regional Director attached to her answer brief a table to illustrate that stocking rates for range units on the Reservation ranged from 1.65 acres/AUM to 6.32 acres/AUM, which, if the \$18.40/AUM rate were applied, would result in an effective equivalent rental rate ranging from \$11.15/acre to \$2.91/acre. The Regional Director offered the table for illustration purposes only, noting that stipulated, tribal, owner-use, allotted, and other special rates could apply to tracts within range units. *See* Regional Director's Answer Brief at 14 n.13.

³ The appraiser began by "contact[ing] as many lessors and lessees of private land near the reservation as possible," in excess of 90 individuals, and conducting interviews with those willing to share information. *Id.* at 5.

multiple counties, including, among others, Lyman, Bennett, Cherry, Tripp, Pennington, Jackson, Dawes, Mellette, Todd, and Niobara. *See id.* at 8. In considering such rates, the appraiser took into account the “allocation of expenses between the tenant and the owner” and the value differences in grazing rental rates for seasonal use and year-long use. *Id.* at 7. The appraiser reported that the highest lease rates available in this data set came from the LaCreek Wildlife Refuge. *Id.* at 8. The appraiser attributed this mainly to “the season of use, May through June, which is the most sensitive time to graze native range land.” *Id.* The appraiser found that “without using the LaCreek leases, because of their season of use, the remaining data[] basically supports \$29.00/AUM [seasonal use] on the Rosebud Reservation.” *Id.* at 10. After converting the seasonal use rental rate to a year-long use rate⁴ and making deductions for the rental prepayment requirement and the preparation fee assessment, the appraiser concluded that the “grass only” rental rate on the Reservation was \$19.40/AUM. *Id.* at 15.

In accordance with the Regional Director’s instructions, the appraiser also studied and reported on several other factors that might provide a basis to adjust the \$19.40/AUM estimate. For example, the appraiser concluded that the market indicated a value of \$1.00/AUM for dam, wells, and fence maintenance, which appropriately would be deducted because the permittees for Indian grazing lands are responsible for the cost of such maintenance. *See id.* at 12, 15. The appraiser found that market data was not available for certain costs, and that other possible factors identified by the Regional Director did not affect his recommended rental rate. *See id.* at 15-16.

The study, submitted via cover letter dated May 15, 2008, estimated that the rental rate for grazing lands on the Reservation was \$19.40/AUM, *see id.* at 17, while providing additional information regarding possible adjustments to that estimate. The appraiser certified that the study conformed to the USPAP. *Id.* The appraisal was reviewed and approved by Geoff Oliver, OST’s Regional Appraiser for the Great Plains Region. AR Tab 10, Great Plains Regional Appraisal Office Review at 1.

In her August 28, 2008, decision, the Regional Director advised permittees, among others, that, after reviewing the 2009 Grazing Rate Study, she had determined that \$18.40/AUM provided fair annual rental to allotted land owners. AR Tab 3. The Regional

⁴ The appraiser described the seasonal use rate as “basically a May through October rate.” *Id.* at 13. In order to convert the seasonal use rate to a year-long use rate, the appraiser discounted the rate by 24%. *Id.* at 13-14; *see also id.* (explaining that factors such as cattle weight, forage requirements, and protein supplementation are used to determine the conversion rate).

Director explained that she “reduc[ed] the base grazing rental rate of \$19.40[/]AUM to \$18.40[/]AUM” because the 2009 Grazing Rate Study recommended a \$1.00/AUM deduction “when the lessee provides fencing materials.” *Id.*⁵ Accordingly, she concluded that the 2009 Rosebud Reservation year-long grazing rental rate for allotted lands would be adjusted to \$18.40/AUM for existing permits where landowners had not established their own rental rate. AR Tab 3.⁶

Appellant, and the Rosebud Indian Land and Grazing Association (Association), appealed the Regional Director’s decision to the Board.⁷ In her notice of appeal, Appellant raised the three arguments described earlier. Appellant did not file an opening brief. The Regional Director filed an answer brief. Appellant did not file a reply, but after the Association withdrew its appeal and the Board solicited a statement from Appellant on whether she wished to pursue her appeal, Appellant submitted a letter stating that she wished to do so, and raising several arguments not raised in her notice of appeal. *See* Letter from Appellant to Board, Jan. 15, 2010.

Standard of Review

The setting of a rental rate for grazing permits, like the setting of any other lease rate, requires the exercise of expertise and discretion. *Fort Berthold Land & Livestock Ass’n v. Great Plains Regional Director*, 35 IBIA 266, 270 (2000). As we noted in *DuBray*:

The Board has a well-established standard of review of grazing rental rate decisions. The Board’s role is to determine whether the adjustment or rental

⁵ Although the Regional Director described the recommended \$1.00/AUM deduction as necessary to account for costs associated with fencing, the 2009 Grazing Rate Study makes clear that this deduction also covered costs for maintenance of fences, dams, and wells. *See* AR Tab 10, 2009 Grazing Rate Study at 12.

⁶ The rate also applied to any new permits that would be offered for the 2009 grazing season, but the only permits at issue in this appeal are Appellant’s existing permits for which the Regional Director’s decision made a rental adjustment.

⁷ The Board initially consolidated the two appeals and granted an unopposed motion by the Regional Director to limit the scope of the appeals to the permits held by the 36 individual permittees who had been identified by the Association as its members, which included Appellant. *See Rosebud Indian Land and Grazing Ass’n and its Members v. Acting Great Plains Regional Director*, 51 IBIA 57, 57 (2010). The Association subsequently withdrew its appeal, *see id.*, after which Appellant pursued her individual appeal separately.

value determination is reasonable; that is, whether it is supported by law and by substantial evidence. If BIA's determination is reasonable, the Board will not substitute its judgment for BIA's. The burden is on the appellant to show that BIA's action is unreasonable.

48 IBIA at 18 (quoting *Rosebud Indian Land and Grazing Ass'n and its Members v. Acting Great Plains Regional Director*, 41 IBIA 298, 301 (2005)) (internal citations omitted). We review questions of law de novo. *DuBray*, 48 IBIA at 18; *see also Frank v. Acting Great Plains Regional Director*, 46 IBIA 133, 140 (2007).

Discussion

Appellant raises three specific arguments in her notice of appeal to support her overall contention that the Regional Director's decision to adjust the grazing rental rate to \$18.40/AUM for the 2009 grazing season imposes an undue hardship on permittees and did not consider various costs that permittees must sustain. But Appellant fails to support her bare allegations with supporting evidence, or to articulate any specific deficiency in the market analysis upon which the Regional Director relied to determine the price-per-AUM for Appellant's range units. In her subsequent letter to the Board, Appellant raises several new arguments, but those arguments are not properly raised and we decline to consider them based on our well-established general rule that an appellant must raise all arguments in her notice of appeal and statement or reasons, or in an opening brief. We conclude that Appellant has failed to satisfy her burden of proof to demonstrate error in the Regional Director's decision, and therefore we affirm that decision. We address each of Appellant's three properly raised arguments in turn.

First, Appellant argues that the Regional Director should not have increased the grazing rental rate to \$18.40/AUM because the Reservation has been affected by "an extended period of drought of at least 8 years" and Appellant has "voluntarily reduced [her] stocking during this period." Notice of Appeal at 1. While Appellant complains about drought conditions, she does not provide any evidence of such conditions. *See DuBray*, 48 IBIA at 18 (appellant must show that BIA's action is unreasonable). In contrast, BIA provided evidence, to which Appellant did not reply, indicating that no drought existed on the Reservation during the time period relevant to the 2009 grazing rate study. *See* Regional Director's Answer Brief at 8; U.S. Drought Monitor Maps for December 25, 2007, July 15, 2008, and December 30, 2008. Even if we were to accept Appellant's allegation that an earlier multi-year drought had lingering effects that affected the value of forage — i.e., the price of an AUM — Appellant provides no evidence or explanation to support her assumption that those effects would not have been reflected in the data

considered in the market study or, if not, that the effects necessarily would have decreased the value of forage, or left it constant, rather than increased the value due to scarcity.⁸ Thus, Appellant's allegations concerning an 8-year drought provide no basis for us to conclude that the Regional Director's \$18.40/AUM grazing rate decision for the 2009 grazing season is defective as applied to Appellant's range units.

Second, Appellant contends that the Regional Director failed to consider that prices for agricultural necessities, such as fuel, trucking, sale expenses, labor, fencing materials, water pumps, water tanks, and other water necessities have "skyrocketed." Notice of Appeal at 1. But Appellant has not provided any evidence to support her argument, nor has she quantified the costs of the agricultural necessities or price increases that she mentions or explain how the rate decision is flawed as applied to her range units. Moreover, as noted earlier, the record shows that the Regional Director did identify a variety of costs and expenses for the appraiser to consider in estimating the value of forage on the Reservation. Appellant does not identify any flaws in the market study.⁹ Appellant's bare assertions, standing alone, are not sufficient to meet her burden of showing that the Regional Director's decision is unreasonable. *See Bird v. Acting Rocky Mountain Regional Director*, 48 IBIA 94, 104 (2008).

Third, Appellant argues that the Regional Director failed to solicit "input from local people before this decision was reached." Notice of Appeal at 1-2. In making this argument, Appellant does not identify any statute or regulation that requires the Regional Director to consult with permittees prior to making a rate adjustment decision. To the contrary, as the Board explained in *Rosebud Indian Land and Grazing Ass'n*, permittees lack standing to appeal on the question of consultation regarding a rate adjustment to existing

⁸ We note that Appellant contends that in response to the drought, she voluntarily reduced her stocking and received no refund for the voluntary reduction. Notice of Appeal at 1. But if Appellant believed that the carrying capacity of her range units was reduced during the drought, her proper recourse apparently would have been to ask BIA to make a decision reducing the carrying capacity, thus charging her for fewer AUMs. BIA's appeal regulations include a provision allowing a party to demand a decision by a BIA official and, if no timely decision is issued, to appeal from the inaction to the next level. *See* 25 C.F.R. § 2.8.

⁹ At the time Appellant filed her notice of appeal, she had not yet received a copy of the market study, and thus she stated that as of that time, she had been unable to review the analysis. After the appeal was filed, however, the administrative record, including the market study, was made available to the parties when briefing was scheduled. As noted earlier, Appellant did not file an opening brief.

permits because Secretarial or Presidential directives regarding consultation pertain to government-to-government consultation with *tribes*, and not to consultation with *permittees*. 41 IBIA at 306-07. Consequently, any alleged failure by the Regional Director to consult with permittees does not provide a basis for finding error in the Regional Director's decision.¹⁰

The above three arguments were raised by Appellant in her notice of appeal. As noted earlier, in a letter submitted by Appellant after briefing had been completed, Appellant indicated her desire to pursue her appeal (notwithstanding the Association's withdrawal of its appeal) and she raised several new arguments. Even if we were to treat the letter as a reply brief, and to excuse its lack of timeliness, we find no reason to depart from our well-established rule not to consider arguments raised for the first time by an appellant in a reply brief. See *Gardner v. Acting Western Regional Director*, 46 IBIA 79, 89 n.9 (2007); *Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 226 n.8 (2007). Appellant has provided no explanation for failing to address these issues in an earlier pleading. We therefore see no reason to depart from that rule here, and we decline to consider those issues.¹¹

¹⁰ BIA's discretion to consult with permittees is not at issue in this case; only its alleged *obligation* to do so. It appears that the Regional Director did make an effort to solicit input from the Tribe before making the grazing rate decision, and that the solicitation may have prompted comments to BIA from the Association and from the Executive Director of the Tribal Land Enterprise. See AR Tabs 7 - 9. Both criticized the \$19.40/AUM estimate by the appraiser as too high. The Regional Director responded to the Tribe on August 11, 2008. See AR Tab 6. Thus, although BIA did not directly solicit comments from permittees, and had no duty to do so, BIA did receive and consider some local input.

¹¹ One issue raised by Appellant in her letter may bear brief mention, if only because it was raised in the Association's appeal and Appellant is a member of the Association. In her January 15, 2010, letter to the Board, Appellant argues that it is error for BIA to bill the rate for allotted lands on a given tract, even if fractional ownership in a tract of allotted land is shared by the Tribe. Even assuming that this issue is properly considered in Appellant's appeal, the Board rejected the same argument in *Rosebud Indian Land and Grazing Ass'n*, 50 IBIA at 59, and we decline to revisit that issue here.

Conclusion

Appellant has not met her burden of showing that the Regional Director's decision is unreasonable or is not supported by law or substantial evidence. Accordingly, we affirm the decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's decision to adjust the grazing rental rate for the 2009 grazing season to \$18.40/AUM for individually-owned Indian land on the Reservation.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge